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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

444 W. OCEAN, LLC, Plaintiff and Respondent, v. SIMMAX ENERGY (CA), LLC, Defendant; 1211658 ALBERTA, LTD, Third Party Claimant and Appellant.	B210321 (Los Angeles County Super. Ct. No. NC039883)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joseph E. DiLoreto, Judge. Reversed.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, Simon Aron for Third Party Claimant and Appellant.

Cloud & Olsen, Christopher T. Olsen, Scott B. Cloud for Plaintiff and Respondent.

This is an appeal from an order denying appellant 1211658 Alberta, LTD's third-party claim pursuant to Code of Civil Procedure section 720.210. We reverse, as we explain:

In February 2008, respondent 444 W. Ocean, LLC obtained a judgment against DG Cogen Partners LLC in the amount of $528,878. 444 W. Ocean then obtained a writ of execution in that amount, and the Sheriff of San Luis Obispo County levied the writ on Cogen's bank account at Bank of America.

Under Code of Civil Procedure section 720.210, "Where personal property has been levied upon under a . . . a writ of execution, . . . a third person claiming a security interest in or lien on the personal property may make a third-party claim under this chapter if the security interest or lien claimed is superior to the creditor's lien on the property." (Code Civ. Proc., § 720.210, subd. (a).) On May 8, 2008, Alberta filed such a claim, asserting a security interest in Cogen's funds. (Code Civ. Proc., §§ 720.210, 720.220.) Under the statutory scheme, when a third-party claim is filed, either the judgment creditor or the third-party claimant may file a petition for hearing in the superior court to determine the validity of the third-party claim. (Code Civ. Proc., § 720.310.) 444 W. Ocean filed such a petition. "At a hearing on a third-party claim, the third person has the burden of proof." (Code Civ. Proc., § 720.360.)

At the hearing, Alberta presented evidence of a prior perfected security interest.[1]

"A security interest only becomes enforceable against a debtor or third parties once three conditions exist: (1) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a

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[1] Under Code of Civil Procedure section 697.590, subdivision (b), "priority between a judgment lien on personal property and a conflicting security interest in the same personal property shall be determined according to this subdivision. Conflicting interests rank according to priority in time of filing or perfection. In the case of a judgment lien, priority dates from the time filing is first made covering the personal property. In the case of a security interest, priority dates from the time a filing is first made covering the personal property or the time the security interest is first perfected, whichever is earlier, . . ."

description of the collateral, (2) value has been given, and (3) the debtor has rights in the collateral. ([Cal. U. Com. Code,] § 9203, subd. (1).)" (*LeFlore v. Grass Harp Productions, Inc.* (1997) 57 Cal.App.4th 824, 833.)

Alberta's security interest was based on two 2004 loans to judgment debtor Cogen from First American Bank, totaling over $19 million. Those notes and the accompanying security interest were assigned to Citibank Texas, then assigned from Citibank Texas to Alberta. In response to 444 W. Ocean's petition, Alberta presented the original notes between Cogen and First American Bank ("Notes"); the UCC financing statement filed with the Delaware Secretary of State relating to those Notes, listing Cogen as the debtor and First American Bank as the secured party; a Loan Assignment evidencing the 2005 assignment of the Notes to Alberta; and two amended financing statements, both filed with the Delaware Secretary of State, the first listing Citibank as the secured party, and the second listing Alberta as the secured party.

If admitted, Alberta's documents would certainly prove a prior perfected security interest, and we do not understand 444 W. Ocean to argue otherwise. However, the trial court sustained 444 W. Ocean's objections to the declaration of Alberta officer and director Brad Kruper, who authenticated the documents. (The Loan Assignment was also authenticated by Ian Reynolds, an attorney who declared that he represented Alberta in the negotiations with Citibank. 444 W. Ocean's objections to Reynolds's declaration were not sustained, and the document was before the court.)

Alberta argues that the court erred in these evidentiary rulings. We agree. "[A] document is authenticated when sufficient evidence has been produced to sustain a finding that the document is what it purports to be ([(Evid. Code,] § 1400). As long as the evidence would support a finding of authenticity, the writing is admissible." (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321.) Alberta's declarations were sufficient.

Kruper declared that he was an officer and director of Alberta, that in 2005 he represented Alberta in negotiations with Citibank concerning the acquisition of the Notes

and security interest, and that the negotiations resulted in the Loan Assignment, which he executed for Alberta. Kruper declared that Alberta paid Citibank $350,000 for the Loan Assignment, that the Notes, Security Agreement, and UCC financing statements which were exhibits to the declaration were true and correct copies of the documents they purported to be, and that all those documents were delivered to Alberta on or before January 11, 2006.

Kruper represented Alberta in its negotiations with Citibank which led to Alberta's purchase of the Notes and Security Agreement. He was thus necessarily familiar with those documents. He was competent to authenticate not only the Loan Assignment, which he executed, but the other documents, which are identified in the Loan Assignment and are the documents conveyed by that assignment.

Alberta thus proved a prior perfected security interest, and should have prevailed in its third party claim.

444 W. Ocean makes several arguments to the contrary.

First, 444 W. Ocean argues that Alberta cannot prevail because it failed to file and serve a proper third party claim. The argument is that the claim was not proper because it was verified by Daryl Kruper as authorized agent for Alberta. 444. W. Ocean similarly argues that Alberta's documentary evidence was properly excluded because the documents were not attached to the claim. (Code Civ. Proc., § 720.230, subd. (b).)

444 W. Ocean cannot prevail in its attack on the form of the claim, because it did not put the claim before the court. Under the statutory scheme, the party which files the petition must serve the levying officer with notice of the time and place of hearing, and that on receipt of notice, that officer will file a copy of the third party claim with the court. (Code Civ. Proc., §§ 720.320, subd. (a)(2); 720.330.) 444 W. Ocean did not file a notice with the sheriff, so that the claim was not filed with the trial court.[2]

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[2] Alberta has attached what purports to be a copy of that claim to its opening brief. We deem this a request for judicial notice, and deny the request. The document was not before the trial court, and cannot be relevant to any issue on appeal.

444 W. Ocean did submit the declaration of counsel to the effect that the third-party claim was verified by Daryl Kruper, and also documents indicating that Daryl Kruper was president of Cogen. 444 W. Ocean argues that Daryl Kruper could not have had personal knowledge of the facts in the claim, that the claim was a sham, and that Daryl Kruper was trying to claim his own money.

We do not see that verification by Daryl Kruper would invalidate the claim. Code of Civil Procedure section 720.130 specifies that a third-party claim must be executed under oath and must contain specified information, such as the name and address of the third-party claimant, a description of the interest claimed, and so on. The statute does not say that the claim must be executed by the third-party claimant, and we can think of no reason why we would conclude that the information required would be outside the personal knowledge of a Cogen officer.[3]

444 W. Ocean next argues that Alberta failed to prove that it gave value for the security interest, citing *LeFlore v. Grass Harp Productions, Inc.*, *supra*, 57 Cal.App.4th 824. 444 W. Ocean's argument is based on the routine and familiar recitation in the Loan Assignment that Alberta paid ten dollars "and other good and valuable consideration" for the assignment from Citibank.

Alberta argues that 444 W. Ocean is looking to the wrong transaction, in that the security interest was created with the Citibank loan, not the transfer to Alberta. However, even if 444 W. Ocean is correct, Alberta produced evidence that it paid $350,000 for the loan assignment. Brad Kruper so declared, and so did Reynolds. That is sufficient.

As part of this argument, 444 W. Ocean argues that the claim is "suspicious," involves self-dealing between brothers and is an attempt to insulate Cogen from execution on the judgment. (Without citation to the record, 444 W. Ocean argues that Brad and Daryl Kruper are brothers.) 444 W. Ocean cites the evidence that the Loan

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[3] Other documents in the record indicate that Alberta acquired the membership units and assets of Cogen in March 2006. We know nothing more about Cogen's or Alberta's corporate structure or Daryl Kruper's role, but nothing in 444 W. Ocean's argument indicates that we need to.

Assignment took place shortly after it, 444 W. Ocean, informed Cogen that it would pursue its remedies for Cogen's breach of contract. 444 W. Ocean's claim is a claim of a fraudulent transfer to Alberta. 444 W. Ocean had the burden of proof on such a claim (*Whitehouse v. Six Corp.* (1995) 40 Cal.App.4th 527, 535), and it is easy to see that it did not carry its burden. It did not present facts in support of its theory.

Finally, 444 W. Ocean makes an argument under *ITT Commercial Finance Corp. v. Tech Power, Inc.* (1996) 43 Cal.App.4th 1551. That case concerned a third-party claimant which held a perfected security interest in the judgment debtor's inventory. The third-party claimant was thus entitled to the funds in the judgment debtor's deposit account, the subject of the levy, only if it could show that those funds were identifiable as the proceeds of the sale of the inventory. (*Id.* at p. 1556.) The court held that the third-party claimant "had the initial burden of proving that the funds in the deposit account derived from the sale of its collateral," and that it carried that burden with the declaration of the controller that the proceeds from the sale of inventory were deposited into the bank account. The burden then shifted to the judgment creditor to produce evidence which contradicted the declaration. This, it failed to do.

444 W. Ocean argues that "In the absence of evidence of detailed tracing, such as that provided . . . in *ITT*, Alberta is required to give notice to the bank in order to perfect its security interest. It is undisputed in this instance that no such notice was ever given. Accordingly, its security interest was never perfected."

First, it is not clear that *ITT* is relevant to this case. As Alberta contends, a security interest may be perfected by filing. (Cal. U. Com. Code, § 9310, subd. (a); *Cassel v. Kolb* (1999) 72 Cal.App.4th 568; 4 Witkin, Summary of Cal. Law (9th ed. 1990) Secured Transactions in Personal Property, §§ 76 et seq.) 444 W. Ocean advances no reason why the filings presented by Alberta did not suffice to perfect its interest, and we see none.

Further, our reading of the security agreement here would lead us to conclude that First American (and thus, Alberta) had a security interest in Cogen's "accounts" and

"deposit accounts," as well as in its inventory and other assets, so that the evidence of tracing of assets, found in *ITT*, was not required. However, even if Alberta was required to provide the detailed tracing found in *ITT*, it met that burden.

Alberta submitted the declaration of Erin Gonzalez to the effect that she was Cogen's office manager from September 2006 to May 2008, that she had personal knowledge of the facts in her declaration, and that one of her responsibilities was to monitor Cogen's accounts with Bank of America, including the account which was the subject of the levy. She declared that "I was responsible for recording and processing the checks and other payments received from customers of DG Cogen. I was responsible for seeing that such funds were deposited into" that account.

In the third paragraph, Gonzalez declared that "On or about April 28, 2008, $49,940.77 was removed from the [Bank of America] Account as a result of a levy of a Writ of Execution by the San Luis Obispo County Sheriff. Attached hereto as Exhibit 'H' is a true and correct copy of DG Cogen's Statement for the Account for the period April 1, 2008 through April 30, 2008. As reflected on this Statement, DG Cogen made three deposits totaling $161,241.63 in the weeks prior to the levy of the Writ of Execution. These deposits consisted of the proceeds of DG Cogen's accounts receivables collected during April of 2008 along with the proceeds of copper recycling of $420." The trial court sustained 444 W. Ocean's objections to this paragraph, finding lack of personal knowledge.

The court thus erred. Gonzalez declared that she was responsible for processing the checks which Cogen received from its customers, and for making sure that the funds were deposited into the Bank of America account. She had sufficient personal knowledge for her declaration that the funds in that account were the proceeds of Cogen's accounts receivable.

Disposition

The judgment is reversed. Appellant to recover costs on appeal.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.